

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2302-CR

Cir. Ct. No. 2009CF29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CARLOS AGUIRRE RIVERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Reversed and cause remanded.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Carlos Aguirre Rivera appeals judgments convicting him of four counts of violating a domestic abuse injunction and four counts of bail jumping. Rivera also appeals an order denying his postconviction motion. Rivera contends that he was denied the effective assistance of counsel at

trial when his attorney failed to obtain a stipulation to prevent the jury from hearing that the bail jumping charges arose from conduct that occurred while Rivera was on bond in cases charging strangulation and felony intimidation of a victim. We agree that Rivera was denied the effective assistance of counsel. We reverse.

¶2 In March 2012, the State filed a consolidated information charging Rivera with six counts of felony bail jumping, five counts of knowingly violating a domestic abuse injunction, one count of attempted burglary, and one count of obstructing an officer. The information stated that Rivera was charged with bail jumping for violating the no contact provision of his bond in an earlier case that charged Rivera with strangulation and felony intimidation of a victim.

¶3 A jury trial commenced on April 24, 2013. During voir dire, the circuit court read the information to the jury. During jury instructions, the court read the information to the jury a second time. The court instructed the jury that the first element of the bail jumping charges was that Rivera had been charged with a felony, and that “[t]he crimes of strangulation and felony intimidation of a victim are felony offenses.”

¶4 The State asked to send the bond forms to the jury during deliberations. Defense counsel objected, expressing concern that the bond forms contained irrelevant and prejudicial information by listing the prior charges against Rivera. The circuit court allowed the bond forms to go to the jury over the defense objection. Additionally, counsel for the parties stipulated that Rivera had been arrested “for felony domestic abuse crimes,” and the court read the stipulation to the jury twice and sent the stipulation to the jury during deliberations.

¶5 The jury returned verdicts of guilty as to four counts of felony bail jumping and four counts of knowingly violating a domestic abuse injunction. The jury returned not guilty verdicts as to the remaining charges.

¶6 Rivera moved for postconviction relief, arguing that he was denied the effective assistance of counsel when his attorney failed to prevent the jury from hearing the charges in the earlier case underlying the bail jumping offenses. Following an evidentiary hearing, the circuit court found that counsel was not deficient and that any alleged deficiency did not prejudice the defense. The court therefore denied Rivera's postconviction motion. Rivera appeals the judgment of conviction and the order denying his postconviction motion.

¶7 A claim of ineffective assistance of counsel must show that counsel's representation was both deficient and prejudicial to the defense. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. To show deficient performance, a defendant must show that counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To show prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thiel*, 264 Wis. 2d 571, ¶20 (quoted source omitted).

¶8 Rivera contends that his counsel was ineffective by failing to prevent the jury from hearing thirteen times that Rivera had been charged with strangulation and intimidation of a victim. Rivera argues that, had trial counsel offered a proper stipulation prior to trial that the jury could be informed simply that Rivera had been charged with a felony and released on bond, the circuit court

would have been required to accept the stipulation and thereby avoid any mention to the jury of the specific charges. *See Old Chief v. United States*, 519 U.S. 172, 174-75 (1997) (holding that when evidence of a prior conviction is necessary solely to prove the defendant’s status, a court is required to grant the defendant’s offer to concede the prior conviction); *State v. Veach*, 2002 WI 110, ¶124, 255 Wis. 2d 390, 648 N.W.2d 447 (holding that a circuit court is required to accept a stipulation to an element of a crime if the element is a status element rather than an element of the criminal act forming the basis for the charge). Rivera argues that he was prejudiced by his counsel’s failure to prevent the jury from hearing the nature of the prior charges because the repeated references to the charges of strangulation and intimidation of a victim presented Rivera as a dangerous and violent person of poor character.¹ *See Old Chief*, 519 U.S. at 185 (explaining that informing the jury of the name or nature of the prior offense carries a substantial risk of unfair prejudice when that evidence “would be arresting enough to lure a juror into a sequence of bad character reasoning”). We agree.

¶9 The State concedes that Rivera’s trial counsel was deficient by failing to obtain a stipulation to prevent the jury from hearing the repeated references to the specific prior charges against Rivera. The State argues, however, that Rivera’s ineffective assistance of counsel claim fails on the prejudice prong. The State contends that the defense was not prejudiced by the jury hearing references to the prior charges against Rivera because: (1) the jury heard the same information regarding the charges against Rivera during trial testimony; (2) the

¹ Because we agree with Rivera that the repeated references to Rivera’s prior charges for strangulation and intimidation of a victim were prejudicial, we do not reach Rivera’s prejudice arguments based on references to Rivera’s other prior charges or several statements to the jury that Rivera had been charged with “felony domestic abuse crimes.”

fact that Rivera was not convicted of all the charges against him establishes that the jury was not prejudiced against him; (3) the jury was not told any details as to the specific violent acts underlying Rivera's prior charges; (4) the court was following its standard practice of reading the full information to the jury when it read the prior charges to the jury during voir dire and jury instructions, and the court informed the jury that the information was not evidence; and (5) the court was merely filling in the blanks of the pattern jury instruction for bail jumping when it informed the jury as to the prior charges against Rivera as part of the jury instructions, *see* WIS JI—CRIMINAL 1795. We are not persuaded.

¶10 First, we do not agree with the State that the trial testimony it cites reveals the nature of the prior charges against Rivera. The State points to testimony that Rivera had been arrested for domestic abuse charges and was subject to a domestic abuse temporary restraining order, and evidence of relationship discord between Rivera and the victim. However, nothing in the trial testimony indicates that the prior charges against Rivera included the violent crimes of strangulation and felony intimidation of a victim.

¶11 Second, we do not agree with the State that the fact that the jury did not find Rivera guilty as to every charge establishes that the jury was not prejudiced against him; it is equally as logical to infer that Rivera would have been acquitted of all the charges had the multiple references to his charges for strangulation and intimidation of a victim been properly excluded.

¶12 Third, we also disagree with the State that Rivera was not prejudiced by the references to the strangulation and intimidation charges based on the lack of any detail regarding the acts underlying those charges. Strangulation and felony

intimidation of a victim charges are, by description, violent crimes; naming the charges was sufficient to prejudice the jury as to Rivera's character.

¶13 As to the fourth and fifth arguments, we are not persuaded by the State's arguments that Rivera could not have been prejudiced because the court was following its standard procedure and the pattern jury instructions by informing the jury as to the prior charges. The State has conceded that a proper stipulation would have required the court to prohibit the State from revealing that information to the jury.

¶14 In sum, we conclude that Rivera was denied the effective assistance of counsel when his trial counsel failed to obtain a stipulation that would have prevented the jury from hearing multiple times that Rivera had been charged with strangulation and felony intimidation of a victim. Accordingly, we reverse the judgment of conviction and the order denying postconviction relief, and remand to the circuit court to grant Rivera a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

